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Matter of Baskerville v Dennison

2007 NY Slip Op 33016(U)

September 24, 2007

Supreme Court, Albany County

Docket Number: 0262207/2007

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of MARTIN LUTHER BASKERVILLE,

Petitioner,

-against-

ROBERT DENNISON, Chairman of the Division of Parole,

Respondent,

For A Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-07-ST7702 Index No. 2622-07

Appearances: Martin Luther Baskerville
Inmate No. 90-T-4745
Petitioner, Pro Se
Green Haven Correctional Facility
594 Route 216
Stormville, NY 12582-0010

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Green Haven Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent made on August 2, 2006 in which petitioner was denied discretionary release on parole. The petitioner, who stands convicted of second degree murder, and first and second degree robbery, argues that his due process rights were denied by reason that the Parole Board failed to provide an adequate explanation with regard to its decision to deny release. He also faults the Parole Board for not providing guidance with respect to how he could qualify for parole in the future. He points out that he has participated in numerous institutional programs during his incarceration including the RSAT program, the Aggression Replacement Training Program, the Inmate Program Associate Training, the Alternatives to Violence Project, Inmate Program Associates Training, Substance Abuse Awareness (Islamic Therapeutic Program), Psycho Education Trauma Group, South Exploration/Release Readiness Program, and the Behavior Modification Program. He maintains that he has also completed numerous inmate program assignments. The petitioner criticizes the Parole Board for not acknowledging his institutional record and his efforts at rehabilitation. He indicates that he is not a career criminal. He asserts that the executive department is carrying out a policy of denying parole release to violent felony offenders. In his view the Parole Board prevented him from fully discussing his accomplishments during the parole interview, and thereby

violated his rights to due process. The petitioner maintains that the Parole Board did not consider all of the statutory factors under Executive Law § 259-i, particularly those favorable to the petitioner; and that the decision had been predetermined by the Parole Board prior to the parole interview.

The petitioner asserts that the Parole Board relied upon erroneous information. He maintains that the Parole Board ignored his alibi that he was incarcerated in the Bergen County (New Jersey) Jail on the night his crimes were committed. He argues that there is other evidence that demonstrates that he was not in the apartment at the time his victim was killed. He also complains that the determination to deny parole release is unfair from the standpoint that his accomplices have already been released.

The reasons for the respondent's determination to deny petitioner release on parole are set forth as follows:

> "Parole is denied. Given the serious nature and violent circumstances of your in concert criminal conduct in the instant offense of murder 2nd, robbery 1st and robbery 2nd. Your multi-state history of convictions dates back to 1985 and includes larcenous and forgery related offenses. Your programming and disciplinary records were reviewed and considered in this decision. Your court imposed sentence is appropriate."

As stated in Executive Law §259-i (2) (c) (A):

> "Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so

> deprecate the seriousness of his crime as to undermine respect for law. In making the parole release decision, the guidelines adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate; (iv) any deportation order issued by the federal government against the inmate []; (v) any statement made to the board by the crime victim or the victim's representative []" (Executive Law §259-i [2] [c] [A]).

"Parole Release decisions are discretionary and, if made pursuant to statutory requirements, not reviewable" (Matter of Sinopoli v New York State Board of Parole,189 AD2d 960, 960 [3rd Dept., 1993], citing Matter of McKee v. New York State Bd. of Parole, 157 AD2d 944). If the parole board's decision is made in accordance with the statutory requirements, the board's determination is not subject to judicial review (see Ristau v. Hammock, 103 AD2d 944 [3rd Dept., 1984]). Furthermore, only a "showing of irrationality bordering on impropriety" on the part of the Parole Board has been found to necessitate judicial intervention (see Matter of Silmon v Travis, 95 NY2d 470, 476 [2000], quoting Matter of Russo v. New York State Bd. of Parole, 50 NY2d 69, 77 [1980]). In the absence of the above, there is no basis upon which to disturb the discretionary determination made by the Parole Board (see Matter of Perez v. New York State of Division of Parole, 294 AD2d 726 [3rd Dept., 2002]).

As pointed out by the respondent, the petitioner failed to raise the following issues in his administrative appeal: that the Parole Board ignored the fact that his accomplices have already been released; that the Parole Board failed to provide guidance with respect to his future release; that the Parole Board decision was determined by an executive department policy to deny parole to violent felony offenders. The Court has reviewed the petitioner's administrative appeal and finds this to be true. The Court finds that these arguments are un-preserved for judicial review and may not now be considered (see Matter of Cruz v Travis, 273 AD2d 648 [3rd Dept., 2000]). Apart from the foregoing, the Court is of the further view that these arguments have no merit. There is no requirement in Executive Law §259-i (2) (c) (A) that the Parole Board consider the fact that an inmate's accomplices have been released. Petitioner's argument that the Parole Board is required to advise the petitioner and/or provide guidance with regard to the programs he should take, or rehabilitative efforts he should engage in to increase his chance for release at a future parole interview has no merit (see Executive Law § 259-i [2] [a]; 9 NYCRR § 8002.3; Boothe v Hammock, 605 F2d 661 [2nd Cir, 1979]; Matter of Freeman v New York State Division of Parole, 21 AD3d 1174 [3rd Dept., 2005]). The record does not support petitioner's assertion that the decision was predetermined consistent with an alleged executive branch policy mandating denial of parole to all violent felony offenders. The Court, accordingly, finds no merit to the argument (see Matter of Lue-Shing v Pataki, 301 AD2d 827, 828 [3rd Dept., 2003]; Matter of Perez v State of New York Division of Parole, 294 AD2d 726 [3rd Dept., 2002]; Matter of Jones v Travis,

293 AD2d 800, 801 [3rd Dept., 2002]; Matter of Little v Travis, 15 AD3d 698 [3rd Dept., 2005], Matter of Wood v Dennison, 25 AD3d 1056 [3rd Dept., 2006]).

The Court finds that the Parole Board considered the relevant criteria in making its decision and its determination was supported by the record. A review of the transcript of the parole interview reveals that there was almost no discussion of the crimes for which he was incarcerated. The petitioner was provided ample opportunity to discuss his institutional programming. He clearly made his point that he did not commit the crimes for which he was incarcerated by reason that he was incarcerated in New Jersey on the time. His disciplinary record was also discussed, as well as his desire to be discharged to the New Jersey State penal system so that he can commence serving a New Jersey sentence of imprisonment. The decision was sufficiently detailed to inform the petitioner of the reasons for the denial of parole and it satisfied the requirements of Executive Law §259-i (see Matter of Whitehead v. Russi, 201 AD2d 825 [3rd Dept., 1994]; Matter of Green v. New York State Division of Parole, 199 AD2d 677 [3rd Dept., 1993]). It is proper and, in fact, required, that the Parole Board consider the seriousness of the inmate's crimes and their violent nature (see Matter of Weir v. New York State Division of Parole, 205 AD2d 906, 907 [3rd Dept., 1994]; Matter of Sinopoli v. New York State Board of Parole, 189 AD2d 960, supra; Matter of Dudley v Travis, 227 AD2d 863, [3rd Dept., 1996), as well as the inmate's criminal history (see Matter of Farid v Travis, 239 AD2d 629 [3rd Dept., 1997]; Matter of Cohen v Gonzalez, 254 AD2d 556 [3rd Dept., 1998]). The Parole Board is not required to enumerate or give equal weight

to each factor that it considered in determining the inmate's application, or to expressly discuss each one (see Matter of Farid v Travis, supra; Matter of Moore v New York State Bd. of Parole, 233 AD2d 653 [3rd Dept., 1996]; Matter of Collado v New York State Division of Parole, 287 AD2d 921 [3rd Dept., 2001]). Nor must the parole board recite the precise statutory language set forth in the first sentence of Executive Law § 259-i (2) (c) (A) (see Matter of Silvero v Dennison, 28 AD3d 859 [3rd Dept., 2006]). In other words, "[w]here appropriate the Board may give considerable weight to, or place particular emphasis on, the circumstances of the crimes for which a petitioner is incarcerated, as well as a petitioner's criminal history, together with the other statutory factors, in determining whether the individual 'will live and remain at liberty without violating the law,' whether his or her 'release is not incompatible with the welfare of society,' and whether release will 'deprecate the seriousness of [the] crime as to undermine respect for [the] law'" (Matter of Durio v New York State Division of Parole, 3 AD3d 816 [3rd Dept., 2004], quoting Executive Law §259-i [2] [c] [A], other citations omitted).

The Parole Board's decision to hold petitioner for the maximum period (24 months) is within the Board's discretion and was supported by the record (see Matter of Tatta v State of New York Division of Parole, 290 AD2d 907 [3rd Dept., 2002], lv denied 98 NY2d 604).

With regard to the alleged erroneous information relied upon by the Parole Board, petitioner's pre-sentence report reveals that the petitioner was convicted after a jury trial. It indicates that the petitioner was in the apartment with his accomplices when his victim was

killed. Notably, it is well settled that, other than at the time of sentencing, an inmate may not challenge the accuracy of the information contained in a pre-sentence report (see Matter of Cox v New York State Division of Parole, 11 AD3d 766, 767-768 [3rd Dept., 2004]; Williams v Travis, 11 AD3d 788, 789-790 [3rd Dept., 2004])[1].

With respect to petitioner's argument that the Appeals Unit failed to issue a timely decision, the Court observes that such a failure does not operate to invalidate the underlying administrative decision. The sole consequence is to permit the petitioner to deem his or her administrative remedy to be exhausted, and enable the petitioner to immediately seek judicial review of the underlying determination (see 9 NYCRR § 8006.4 [c]; Graham v New York State Division of Parole, 269 AD2d 628 [3rd Dept, 2000], lv denied 95 NY2d 753; People ex rel. Tyler v Travis, 269 AD2d 636 [3rd Dept., 2000]).

Turning to petitioner's arguments concerning an alleged violation of his right to due process, the Court observes that it has been repeatedly held that a constitutionally protected liberty interest does not arise under Executive Law § 259-i, since it does not create an entitlement to, or legitimate expectation of release (see Barna v Travis, 239 F3d 169 [2nd Cir., 2001]; Marvin v Goord, 255 F3d 40 [2nd Cir., 2001], at p. 44; Paunetto v Hammock (516 F Supp 1367 [US Dist. Ct., SD NY, 1981]; Washington v White, 805 F Supp 191 [SDNY,

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[1]Concerning petitioner's various protests of innocence, the Court further notes that petitioner's conviction was, in all respects, affirmed by the Appellate Division First Department in 1996 (see People v Baskerville, 234 AD2d 35, lv to appeal denied 89 NY2d 1088).

1992]). The Court, accordingly, finds no due process violation.

The Court has reviewed petitioner's remaining arguments and finds them to be without merit.

The Court finds the decision of the Parole Board was not irrational, in violation of lawful procedure, affected by an error of law, irrational or arbitrary and capricious. The petition must therefore be dismissed.

Accordingly, it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the respondent who is directed to enter this Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order with notice of entry.

ENTER

Dated: September 24, 2007
Troy, New York

Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated April 13, 2007, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated May 22, 2007, Supporting Papers and Exhibits